THE ASSOCIATION OF GLOBAL CUSTODIANS

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April 30, 2012

Mr. John Sweeney
Office of the Associate Chief Counsel (International)
CC:PA:LPD:PR (REG-121647-10)
Courier's DeskInternal Revenue Service
1111 Constitution Avenue, NWWashington, DC 20044

Re: **Comments on Proposed FATCA Regulations under Sections 1471-1474 of the Internal Revenue Code**

Dear Sir:

The Association of Global Custodians (the "Association" or "AGC")[1] greatly appreciates the opportunity to provide its comments on the proposed regulations under Sections 1471 through 1474 of the U.S. Internal Revenue Code of 1986, as amended, enacted as part of the Foreign Account Tax Compliance Act ("FATCA") provisions of the Hiring Incentives to Restore Employment Act (the "Proposed Regulations"), which were released on February 8, 2012 (Fed. Reg. Vol. 77, No. 31, p. 9022 (REG-121647-10)). The attached comments were prepared by a working group of representatives of AGC members who are tax professionals with oversight responsibility for FATCA implementation.

If you have questions concerning these comments or would like additional information, please contact the undersigned. Members respectfully request a meeting to discuss these

[1] The Association is an informal group of 11 member banks that provide securities safekeeping and asset-serving functions to cross-border institutional investors worldwide. Members provide custody-related services to most types of institutional investors, including investment funds, pension funds, and insurance companies. Association members are listed on the letterhead above.

comments and will follow up with you by telephone to determine the availability of you and your colleagues for such a meeting.

Sincerely yours on behalf of the Association,

Mary C. Bennett
Baker & McKenzie LLP
Secretariat and Counsel to the Association

Cc:
Ms. Emily McMahon
Acting Assistant Secretary for Tax Policy
U.S. Department of the Treasury

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April 30, 2012

Comments on FATCA Proposed Regulations

The Association of Global Custodians ("Association" or "AGC") is pleased to provide these comments on proposed regulations under Sections 1471 through 1474 of the U.S. Internal Revenue Code of 1986, as amended (the "Code"), enacted as part of the Foreign Account Tax Compliance Act ("FATCA") provisions of the Hiring Incentives to Restore Employment Act (the "Proposed Regulations"), which were released on February 8, 2012 (Fed. Reg. Vol. 77, No. 31, p. 9022 (REG-121647-10)). We appreciate the IRS' and Treasury's openness to feedback from industry participants on the Proposed Regulations, as well as on other provisions of FATCA.

In accordance with the directions in the preamble to the Proposed Regulations, we have organized our comments by addressing first issues raised by the Proposed Regulations themselves, following the order of the Proposed Regulations, followed by a comment on the intergovernmental approach to implementing FATCA. Please note that we have focused in this comment letter on those issues we have considered to be our highest priority items. Given the scope and complexity of the Proposed Regulations, and the fairly short period for comment, we are continuing to analyze the implications of the Proposed Regulations and may wish to follow up this letter with a supplemental comment letter which will likely be filed sometime after the April 30, 2012 deadline for comment on the Proposed Regulations. We shall make every effort to finalize any such supplemental submission as soon as possible and would respectfully request our supplemental comments also be given consideration before the Proposed Regulations are finalized.

Issue 1: USFIs should be given additional time to implement documentation and due diligence requirements for new clients (Prop. Reg. §§ 1.1471-1(b)(48), 1.1471-3, 1.1471-4(c) and 1474-1(d)(2))

Summary: The Proposed Regulations require U.S. financial institutions ("USFIs") to implement the FATCA documentation and due diligence requirements for the on-boarding of new client accounts by **January 1, 2013.** However, participating foreign financial institutions ("FFIs") are not required to implement these requirements until the date that the FFI's agreement with the IRS becomes effective, which will be no earlier than July 1, 2013.[2]

Recommendation # 1: The effective dates for applying FATCA procedures to new accounts should be harmonized and apply equally to both USFIs and FFIs. All accounts opened prior to **January 1, 2014** should be treated as preexisting accounts, for both USFIs and FFIs. In addition, FATCA reporting for FFIs should first be required to be filed in 2015 (with respect to calendar year 2014 data).

Support for Recommendation: The AGC respectfully requests that the IRS and Treasury consider providing for uniform implementation dates for USFIs and FFIs, to ensure a level playing field and to eliminate an unworkable timing gap in the Proposed Regulations. While USFIs do have withholding systems in place to perform withholding required under Chapter 3, USFIs will need new fields on account data bases for data capture, new document solicitation and client communication processes, and will need to update their existing systems to be able to validate IRS forms against multiple information sources. In addition, the monitoring requirements for changes in circumstances that would affect the reliability of or duration of documentary evidence are new, and will require operational and process changes. For example, Prop. Reg. § 1.1471-3(c)(6)(ii)(C) provides that documentary evidence that contains an expiration date will be valid only until the end of the expiration period. In addition, USFIs will need to design systems to track passive NFFEs and their underlying owners, as required pursuant to Prop. Reg. § 1.1472-1. These are new requirements that require additional time to implement.

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[2] *See* Prop. Reg. §§ 1.1471-1(b)(48) (definition of preexisting obligation), § 1.1471-3, and § 1.1471-4(c).

The needed updates to systems and processes will be extensive. It is unreasonable to require financial institutions to substantially invest in these changes until IRS and Treasury can consider industry comments and finalize the regulations. Moreover, the IRS has not yet released revised Forms W-8. These forms are needed for financial institutions to understand how the client data will be collected and presented on the forms, and to prepare systems requirements and validation procedures. The consensus among our member banks is that defining business requirements and technical design for due diligence solution will take over a year to complete (including time for revisions based on changes in Final Regulations and revised IRS Forms W-8).

The timeline set forth in the Proposed Regulations is also unworkable because it requires USFIs to obtain new Forms W-8 (with limited exceptions) for all new entity accounts opened after January 1, 2013. *See* Prop. Reg. § 1.1471-3(d). On the Forms W-8, new clients will be required to provide their Chapter 4 classification,[3] which they may not yet have as of that date. In particular, new clients that are PFFIs will not yet have entered into agreements with the IRS to be able to provide an FFI-EIN, as required under Prop. Reg. § 1.1471-3(d)(3).[4]

Financial institutions will also need sufficient time to train staff on the new FATCA requirements (including staff that performs critical AML/KYC review and client on-boarding functions). Internal training on FATCA will be a considerable undertaking for global financial institutions, given the variety of business lines and geographic locations impacted. Moreover, USFIs require enough lead time following the publication of the final regulations and relevant forms and agreements to educate clients about FATCA, including the numerous Chapter 4 classifications and new documentation requirements. Financial institutions will be carrying the substantial burden of ensuring that their customers are informed about FATCA, and this outreach is critical to the successful implementation of the FATCA program. Thus, it is important that USFIs have enough time to develop and deliver accurate and comprehensive communications to educate their account holders, worldwide, about the new FATCA requirements.

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[3] Prop. Reg. § 1.1471-3(c)(ii)(A)(4).
[4] Applications for the FFI Agreements are not required to be filed until June 30, 2013, to avoid FATCA withholding.

Issue 2: Effective Dates for FATCA Reporting and Withholding (Prop. Reg. § 1.1471-2(a))

Summary: If the effective date for the new account documentation and due diligence requirements for USFIs and FFIs is delayed until January 1, 2014, the AGC recommends that the requirements to file information returns and perform withholding under FATCA be similarly adjusted and harmonized for USFIs and PFFIs. Under the Proposed Regulations, information reporting on Form 1042-S on any withholdable payments made to foreign payees does not apply to any payments made before 2014. *See* Prop. Reg. § 1.1474-1(d)(2)(i). Similarly, withholding under Chapter 4 on withholdable payments would not apply before 2014.[5] Prop. Reg. § 1.1471-2(a)(1). However, PFFIs would be required to report the identity of U.S. owners and account balance/value of all U.S. accounts at December 31, 2013. Prop. Reg. § 1.1471-4(d)(7). This limited reporting by PFFIs would apply to accounts identified as U.S. accounts as of June 30, 2014 and would be due to the IRS on September 30, 2014. Prop. Reg. § 1.1471-4(d)(7)(v)(B). The return on which this limited information is to be reported has not yet been published in draft or final form. We understand that U.S. payors who are PFFIs would be required to perform this limited reporting for 2013 only if the PFFI is not required to or does not elect to file Forms 1099 under Chapter 61 for the U.S. accounts. *See* Prop. Reg. §§ 1.1471-4(d)(2)(iii)(A) and 1.1471-4(d)(5)(i). It also appears that both USFIs and PFFIs would be required to report the identities of substantial U.S. owners of NFFEs for 2013, if they receive information on such owners. Prop. Reg. § 1.1472-1(e)(2).

Recommendation #2: The final regulations should not require any information reporting under Chapter 4 by USFIs or PFFIs (including U.S. payors that are PFFIs) on U.S. accounts for calendar year 2013. In addition, the obligation to withhold on withholdable payments should commence no earlier than January 1, 2015.

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[5] Under the literal terms of Prop. Reg. § 1.1472-1(b)(1), a withholding agent would be required withhold on "withholdable payments" made in 2013 (limited to U.S. source FDAP income) to an NFFE that has not made the required disclosures and is not an excepted NFFE. The term "withholdable payments" is not limited to payments made after 2013. *See* Prop. Reg. § 1.1473-1(a). We believe that this omission is inadvertent because reporting under Chapter 4 on a Form 1042 or Form 1042-S applies only to "reportable amounts" paid after 2013. *See* Prop. Reg. § 1.1474-1(c)(1), (d)(1)(i) and (d)(2)(i)(A).

***Support for Recommendation*:** Providing for FATCA reporting on U.S. accounts to begin with respect to calendar year 2014 data would enable financial institutions to focus on the critical tasks of refining their due diligence processes and client documentation collection during 2013 and 2014, resulting in more accurate reporting for the 2014 calendar year. This would also harmonize the start date for reporting under Chapter 4 for both USFIs and PFFIs. As to U.S. accounts identified as of June 30, 2014 and remaining at December 31, 2014, reporting to the IRS would be deferred for a relatively short period (from September 30, 2014 to March 31, 2015). Nevertheless, PFFIs that are U.S. payors would be required to file Forms 1099 for 2013 on income and gross proceeds paid to U.S. accounts held directly by U.S. non-exempt recipients.

FATCA is intended as a reporting regime and not as a withholding tax regime, and accordingly, we believe that the new procedures for determining the Chapter 4 status of financial accounts need to be the priority during 2013 and 2014, and a one-year delay in the onset of FATCA withholding is justifiable. Both USFIs and PFFIs need ample time to develop or purchase systems, and implement new procedures for identifying payees, classifying FFIs, and obtaining and validating the requisite new documentation and then adjust those procedures in response to changes that might be made in the final regulations before the onset of FATCA withholding. In the meantime, the withholding provisions under Chapters 3 (U.S. nonresident withholding) and 61 (backup withholding) will continue to apply to capture a substantial portion of the payments that would otherwise be subject to Chapter 4 withholding in 2014 (limited to U.S. source FDAP income).

The implementation of the systems and procedures necessary to classify and document payees will be a monumental task for the industry, which would be hampered if there is an additional concurrent requirement to implement systems and procedures to withhold and refund under new rules. The changes to systems and procedures necessary to withhold under Chapter 4 will take time to implement. They will involve both capturing new payment types that are currently not subject to withholding with respect to foreign accounts and the creation of two possible paths of withholding for each foreign account as opposed to just one path under current withholding rules. In the grander scheme of FATCA, which will be a permanent fixture of the financial services industry, allowing a one-year delay in the effective date of withholding in

order to enable the industry to successfully implement the foundational aspects of FATCA of classifying and documenting accounts is the right approach. Absent this delay, notwithstanding diligent efforts by the industry to comply, we believe 2014 will be a year of disproportionate withholding and refunds and excessive client servicing issues for financial institutions.

Issue 3: Account Diligence – Validation of Withholding Certificates (Prop. Reg. § 1.1471-3)

Summary: The AGC strongly supports the self-certification approach adopted in the Proposed Regulations to determine the FATCA status of customers and other payees. We appreciate the efforts of the IRS and Treasury in working to align the account diligence requirements of Chapter 4 with the existing Chapter 3 framework. However, we believe certain aspects of the Proposed Regulations endanger this goal by imposing due diligence and documentation requirements that are overly subjective, impractical, and – most critically – incongruent with the regulations promulgated under Section 1441.[6] In particular, we express significant concern with the requirement for withholding agents to scrupulously inspect certain supporting documentation to validate whether the certifications made on withholding certificates under penalties of perjury are indeed true.

The following examples represent areas of concern:

- **Certified Deemed Compliant – Retirement Plans.** The requirement for withholding agents to analyze organizational documents and determine whether such documents "generally support" the payee's claim on a withholding certificate would require a detailed review of the documents to ensure that "no information in the organizational document contradicts the payee's claim that it qualifies as a retirement plan." This unnecessarily broad language could be interpreted to require a page-by-page, line-by-line analysis of complex formation documents comprising several hundred pages of legal

[6] *See, e.g.,* Treas. Reg. § 1.1441-9(b)(2) (permitting a withholding agent to rely on a withholding certificate provided by a foreign tax exempt organization that certifies the IRS has issued a favorable determination ruling, or alternatively, submits an opinion from counsel to the effect that the organization qualifies as tax exempt under section 501(c).

lexicon that may or may not be presented in the predominant language of the local jurisdiction.

- **Certified Deemed Compliant – Nonregistering Local Bank.** A withholding agent is required to obtain a current financial statement or similar document, and must review such statement to determine whether it supports the payee's claim that it operates solely as a bank. The withholding agent must also review its sources of knowledge (seemingly unlimited) to determine whether the payee operates in more than one country or has assets in excess of $175 million. This would necessitate the transformation of account opening personnel into financial analysts capable of decoding sophisticated financial information. Moreover, it is quite likely this information will be presented in a foreign language, making review even more impractical.
- **Certified Deemed Compliant – Low Value FFI.** Withholding agents will be required to obtain organizational documents and/or financial statements for the payee and all members of its expanded affiliated group, and to review these documents to determine whether the FFI has assets in excess of $50 million, or whether there is any evidence that the FFI does not satisfy the requirements to be treated under this category.
- **Exempt Beneficial Owner – Retirement Funds.** Similar to the examination of organizational documents for retirement funds pursuing deemed compliant status, a withholding agent is required to obtain and carefully review organizational documents to determine whether it "generally supports the payee's claim."
- **Active NFFE.** For offshore obligations, requiring withholding agents to determine whether the documentary evidence (or with respect to a preexisting obligation, an SIC code) "unambiguously" establishes the status of the payee seems excessive and too subjective. Whether indicia "unambiguously" establish a particular status is a matter of degree that is likely to result in the inconsistent application of this rule.

Recommendation # 3: The AGC recommends that the IRS and Treasury permit withholding agents to rely on certifications signed under penalty of perjury without further verification.

Support for Recommendation: The wide range of documentation requirements for the certified deemed compliant categories are confusing, unnecessarily complex, and

impractical. First, it is likely that withholding agents will be incapable of even examining the supporting documentation because of its presentation in a foreign language. Second, because the proposed rules rely to a significant extent on the subjective interpretations of withholding agents during the account opening process, they are certain to result in disparate characterizations of a single payee from one withholding agent to another. This will undoubtedly lead to scenarios where one withholding agent concludes one thing, while another determines something quite different, with each having a facially defensible argument that the documentation supports their particular conclusions. A system that places excessive weight on the subjective conclusions of withholding agents is, simply put, not a recipe for ensuring a consistent and successful implementation of FATCA.

Recommendation # 3 (Alternative): In lieu of this approach, for any categories of payees where the IRS believes self-certification is insufficient, the payee should be required to obtain a certification from their counsel or auditor and attach it to their W-8, as is permitted for deemed compliant owner-documented FFIs.

Support for Recommendation: Specifically, we believe the approach adopted in Treas. Reg. §§ 1.1441-7 and 1.1441-9 that focuses predominantly on careful examination of withholding certificates is far superior. We urge Treasury and IRS to recognize FFIs, custodians, and other U.S. financial institutions are not tax advisors, do not staff account opening departments with personnel capable of deciphering and translating complex legal documentation, and should not be required to review organizational documents and financial statements to, in effect, audit a customer's classification made on Form W-8.

Issue 4: Period of Validity (Prop. Reg. § 1.1471-3(c)(6)(ii))

Summary: The AGC is concerned about the period of validity of documentary evidence as defined in the Proposed Regulations. Our concern is founded on the disconnect between these parameters and the period of validity applicable for purposes of Anti Money Laundering (AML) and Know Your Customer (KYC) compliance. For example, the Proposed Regulations provide that a form of documentary evidence "that contains an expiration date will be valid until the end of the expiration period," even if that date exceeds the general three year validity period

applicable to documentary evidence generally. Thus, a valid passport presented at account opening will be invalid for Chapter 4 purposes once it expires, requiring a withholding agent to collect an updated form of documentary evidence. This does not correspond with general AML-KYC practice, which generally permits indefinite validity for documentary evidence presented at account opening.

We believe this introduces an unnecessary requirement for withholding agents to track the various expiration periods associated with documentary evidence and re-solicit documentation from customers iteratively over an indefinite period. Importantly, we believe this fails to align FATCA obligations with the well-established practices developed under the AML-KYC paradigm.

Recommendation # 4: In lieu of this requirement, we urge the Treasury and IRS to simplify these rules by permitting withholding agents to rely on documentary evidence until (and only if) a change of circumstance occurs on the account. In other words, documentary evidence that is valid at its time of presentation should remain sufficient until a change of circumstance requires further action.

Support for Recommendation: The requirement to monitor accounts on an ongoing basis to identify change in circumstances should more than suffice to alleviate concerns about relevant changes to customer statuses – collecting new documentary evidence for existing accounts is an unnecessary burden and does not align with AML/KYC standards.

Issue 5: Electronic Transmission of Withholding Certificates (Prop. Reg. § 1.1471-3(c)(6)(iv))

Summary: The AGC appreciates the flexibility permitted through Prop. Reg. § 1.1471-3(c)(6)(iv) in accepting withholding certificates and related documentation electronically. Fostering an efficient process for the transmission of relevant information between withholding agents and their customers offers the best chance of mitigating FATCA's more significant operational challenges. The current wording of the regulation, however, leaves uncertainty as to the precise scope of electronic transmission. For example, it is unclear

whether withholding agents are permitted to accept signed withholding certificates in portable document format (PDF) delivered through email.

Recommendation # 5: Believing this will further the clear policy objective of establishing an efficient transmission framework, we encourage Treasury and the IRS to clarify the electronic transmission rules by explicitly permitting the delivery of withholding certificates in PDF. In addition, withholding agents should be able to accept certificates signed under penalty of perjury, however delivered, provided that the withholding agent has undertaken reasonable efforts to validate the identity of the sender. For example, a withholding agent could review the sender's electronic mail address to confirm that the origin of a document transmitted via e-mail is the expected origin. Conforming changes should be made to Chapters 3 and 61.

Issue 6: Validation of FFI-EIN (Prop. Reg. § 1.1471-3(d)(3))

Summary: The AGC believes the validation requirements with respect to the FFI-EIN provided by FFI customers are impractical. Specifically, the requirement for withholding agents to continually check the IRS list of FFIs that have lost their "Participating FFI" status raises significant concern. It has been reported that, as a reasonable estimate, the number of FFIs present globally is well into the hundreds of thousands – a number that may be conservatively low. Requiring withholding agents to track the FFI status of thousands of their customers on an ongoing basis among this enormous pool of FFIs is simply impracticable.

Recommendation # 6: We urge the Treasury and IRS to adopt a more simplified validation process that permits a withholding agent to rely on the FFI-EIN provided on a withholding certificate, to the extent it is verified against the list published by the IRS at the time it is presented, and to limit subsequent validation to a once-a-year check (*e.g.*, by January 15) against a cumulative list of FFIs that have *lost* Participating FFI status.

Support for Recommendation: A withholding agent should not be required to periodically check the list of Participating FFIs to ensure their vast customer base remains on the published IRS list. This paradigm is unworkable given the vast number of FFIs. We believe our proposed alternative will satisfy the government's objective – timely identification of FFIs

that lose their PFFI status – without erecting the operational hurdles associated with more iterative validation reviews. Moreover, utilizing a government-maintained cumulative list of FFIs that have lost their status (as opposed to reviewing a list containing the thousands of FFIs that retain such status) will foster a significantly more efficient validation process.

Issue 7: Indicia of U.S. Status (Prop. Reg. § 1.1471-3(e)(4)(i)(B))

Recommendation # 7: The AGC urges the Treasury and IRS to narrow the use of U.S. telephone numbers as indicia of U.S. status.

Support for Recommendation: Telephone numbers change frequently, particularly secondary or temporary numbers (*e.g.*, a U.S. hotel phone number of a nonresident visiting the United States) that may be used to communicate with financial institutions. Requiring withholding agents to track the multiple phone numbers provided by clients to identify potential U.S. telephone numbers is impractical and far from an efficacious manner of monitoring changes in circumstances. In lieu of this approach, we recommend the IRS and Treasury amend the regulation by only requiring withholding agents to examine the primary telephone number provided by a customer, however recorded, and any other number provided by a customer to the extent it is recorded in an electronically-searchable database.

Issue 8: Presumption Rules – Exempt Recipients (Prop. Reg. § 1.1471-3(f)(2) – (4))

Summary: We express significant concern with the proposed presumption rule codified at Prop. Reg. § 1.1471-3(f)(3)(ii) that requires a withholding agent, unable to reliably associate a payment with valid documentation, to presume the payee (other than an individual) is a *foreign entity* to the extent indicia of exempt recipient status under Treas. Reg. § 1.6049-4(c)(1)(ii)(A)(1), (F), (G), (H), (I), (M), (O), (P), or (Q)[7] exist. Since foreign entities are

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[7] *See* Treas. Reg. § 1.6049-4(c)(1)(ii)(A)(1) (regarding a payee if name of the payee contains an unambiguous expression of corporate status that is Incorporated, Inc., Corporation, Corp., P.C., (but not Company or Co.) or contains the term insurance company, indemnity company, reinsurance company, or assurance company, or its name indicates that it is an entity listed as a per se corporation under Treas. Reg. § 301.7701-2(b)(8)(i)), (F) (regarding a foreign government, a political subdivision of a foreign government, and any wholly-owned agency or instrumentality of either of the foregoing), (G) (regarding

presumed to be Nonparticipating FFIs, withholding agents will be required to apply FATCA withholding tax on payments to payees otherwise treated as exempt recipients for Chapter 61 purposes. This will result in the anomalous application of FATCA withholding tax on payments to, *e.g.*, U.S. financial institutions to the extent accounts held on behalf of such payees are not documented with a Form W-9. As an example, the proposed rules would require application of FATCA withholding on payments made to a major U.S. corporation where no foreign address or other indicia of foreign status existed because the payee (as an exempt recipient pursuant to Treas. Reg. § 1.6049-4(c)(1)(ii)(M)) would be presumed a nonparticipating FFI absent a Form W-9. This outcome cannot be reconciled with the essential objectives of FATCA and is a radical departure from existing practice.[8]

Recommendation # 8: The AGC urges the IRS and Treasury to strike Prop. Reg. § 1.1471-3(f)(3)(ii). Instead, the indicators described in Prop. Reg. § 1.1471-3(f)(3)(i)(A)-(C) or a withholding agent's reason to know of a payee's foreign status (triggering withholding under Prop. Reg. § 1.1471-3(f)(8)(ii)) should be sufficient to require a withholding agent to designate a payee as foreign.

Support for Recommendation: Under current law, unless certain indicia of foreign status are present, a withholding agent can presume an exempt recipient is a U.S. person for Chapter 3 purposes (and thus exempt from U.S. withholding tax).[9] Moreover, the same payee can generally be treated as an exempt recipient for Chapter 61 purposes, in many cases without

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an international organization), (H) (regarding a foreign central bank of issue), (I) (regarding a dealer in securities, commodities, or notional principal contracts, that is registered as such under the laws of the United States or a State or under the laws of a foreign country), (M) (regarding a financial institution such as a bank, mutual savings bank, savings and loan association, building and loan association, cooperative bank, homestead association, credit union, industrial loan association or bank, or other similar organization, whether organized in the United States or under the laws of a foreign country), (O) (regarding a nominee or custodian), (P) (regarding a broker as defined in section 6045(c) and Treas. Reg. § 1.6045-1(a)(1)), and (Q) (regarding a dealer in notional principal contracts as defined in Treas. Reg. § 1.446-3(c)(4)(iii)).

[8] We recognize the stated intention of the IRS and Treasury is "to make a conforming change to the presumption rules set forth in Chapters 3 and 61." Insofar as the intended modification to the Chapter 3 and 61 presumption rules follows a similar abandonment of the "eyeball test" we express equal concern, and strongly urge retention of a modified presumption rule under those respective chapters of the Code that likewise does not displace well-established practice.

[9] *See generally* Treas. Reg. § 1.1441-1(b)(3)(iii).

the need to collect Form W-9, thereby eliminating the need to apply backup withholding tax.[10] This well-established framework strikes the proper balance between a robust tax documentation system and a market infrastructure reliant on the reasonable discretion of institutional participants subject to extensive tax reporting obligations and driven to mitigate correlating regulatory risk. We fail to see how pursuit of the objectives of FATCA triggers the need to abandon use of eyeball tests altogether. Quite to the contrary, imposing a regime upon U.S. payors that represents a dramatic departure from well-established practice will undoubtedly threaten success in achieving the core objectives of FATCA by diverting critical resources away from the primary targets of the law – payments to *foreign* financial and nonfinancial entities. In short, necessitating a massive documentation collection effort amongst the U.S. payor industry at this time imposes an inefficient and unnecessary burden that will unquestionably add nothing to the attainment of FATCA's eminent goals.

Issue 9: Vendor Payments as Nonwithholdable "Ordinary Course of Business" Payments (Prop. Reg. § 1.1473-1(a)(4)(iii))

Summary: Prop. Reg. § 1.1473-1(a)(4)(iii) provides that payments made in the ordinary course of a withholding agent's business for "nonfinancial services" are not withholdable payments for Chapter 4 purposes. "Nonfinancial services" is not defined.

Recommendation # 9: We request that the word "nonfinancial" be eliminated each time it appears in Prop. Reg. § 1.1473-1(a)(4)(iii).

Support for Recommendation: We are concerned that payments made for financial-type services, such as fees for subcustodian, investment management and financial data services, could by inference be deemed to be withholdable payments. No distinction should exist between financial-type services and other types of services because financial-type services, like other types of services, are not activities that are susceptible to the US tax evasion that is the subject of Chapter 4. In other words, services, of any type, in the ordinary course of business are not activities that give rise to portfolio income which is the focus of Chapter 4. Further, due to the difficulty and subjectivity of distinguishing financial services from other types

[10] *See, e.g.,* Treas. Reg. § 1.6049-4(c)(1)(ii).

of services, withholding agents might classify payments for the same type of service differently, which would unnecessarily cause inconsistent reporting and withholding results. For example, is a company that grants access to view securities prices and reference data stored on an online database furnishing financial services or a reference/library type of service?

Issue 10: Treatment of Transfer Agents (various sections of the Proposed Regulations)

We had a transfer agent of an investment fund in mind when writing this section, but the concepts apply with respect to any agency relationship in which the principal is the payor (as opposed to the payee) and the agent is the payor's agent.

a. Financial Account is with Principal and not Principal's Agent (Prop. Reg. § 1.1471-5(b))

Recommendation # 10(a): We request that the Proposed Regulations clarify in Prop. Reg. § 1.1471-5(b) (definition of financial account), by way of example or otherwise, that the holder of an account (the "Investor") in a financial institution described in Prop. Reg. § 1.1471-5(b)(1)(iii) (the "Investment Fund") has the account with the Investment Fund and not with the person hired by the Investment Fund to service the account (the "Agent").

Support for Recommendation: The Investor should have a single account with respect to an investment throughout the life of the investment and should not be affected by the status of the service provider to the Investment Fund. For example, whether the Investor's account is a new or preexisting account should only be determined once, based on the first date the investor invested into the Investment Fund.

b. Withholding Agent that is Agent of Investment Fund May Apply the Investment Fund's Requirements (Prop. Reg. § 1.1474-1(a)(3))

Recommendation # 10(b): We request that the Proposed Regulations provide that an Agent may satisfy its Chapter 4 obligations as a withholding agent in accordance with the corresponding Chapter 4 requirements of the Investment Fund.

***Support for Recommendation*:** This would ensure that to the extent the Agent's and Investment Fund's Chapter 4 requirements differ, the Investment Fund's requirements would govern the account. This would also ensure that the Investment Fund and its investors are not automatically affected by the choice of the Investment Fund to hire the Agent. As an example, if the Investment Fund is a "restricted fund" under Prop. Reg. § 1.1471-5(f)(1)(i)(D), it is not required to review an account if certain requirements are met. There is no similar exception available to a withholding agent that is the Agent of the Investment Fund. Accordingly, absent adoption of our request, the Agent would be required to review the accounts otherwise excepted under Prop. Reg. § 1.1471-5(f)(1)(i)(D), which would nullify the exception.

c. Chapter 61 and Backup Withholding Obligations of Agent Should be Satisfied if Chapter 4 Obligations Satisfied (Prop. Reg. §§ 1.1471-4(d) and 1.1474-6(e))

Recommendation # 10(c): We request that the regulations provide that if the Agent of an Investment Fund is a U.S. payor under Chapter 61, the Agent shall be deemed to satisfy its Chapter 61 and backup withholding obligations with respect to the Investment Fund provided the Chapter 4 obligations of the Investment Fund have been satisfied. This provision should apply to any U.S. payor and not merely to a U.S. payor that is a PFFI as contemplated in Prop. Reg. § 1.1471-4(d)(2)(iii).

***Support for Recommendation*:** This would eliminate reporting by both the Investment Fund under Chapter 4 and the Agent under Chapter 61, which would be duplicative, confusing and unnecessary. The Chapter 4 requirements should take precedence because they are more stringent than the Chapter 61 requirements. Also, the Chapter 4 withholding rate (30%) is higher than the current backup withholding rate (28%) and accordingly, Chapter 4 withholding better protects the government. This would also put all Agents on an equal playing field as a matter of commercialization, regardless of whether they are U.S. payors.

d. *New Agent of Investment Fund Should be Able to Rely on FATCA Classification/Status of Investors (Prop. Reg.* § 1.1471-3)

Recommendation # 10(d): We request that Prop. Reg. § 1.1471-3 permit a new transfer/paying Agent to rely on the business records maintained by the preceding transfer Agent for purposes of determining the FATCA status of the Investors in an Investment Fund, when the Investment Fund assigns the Agent functions to a new transfer Agent.

Support for Recommendation: The financial accounts belong to the Fund, not the Agent, and as such should not be treated as new accounts for which the new transfer Agent would be required to solicit, obtain and validate new tax documentation from each Investor, simply because the Investment Fund has decided to use a new Agent. The preceding Agent could retain possession of the valid tax documentation it has collected from the Investors, which the preceding Agent (itself often a withholding agent) may need for audit purposes. The new Agent would be allowed to rely on the determinations of the preceding Agent as to the validity of that tax documentation. U.S. tax documentation for an account that is valid at the time that the servicing of the account is transitioned to a new Agent should remain valid until the end of its normal life so that the Investors are not unduly burdened with a requirement to furnish new documentation at the time of the transition, and the Fund need not incur duplicate costs. Along with the FATCA status of the Investor, the preceding Agent or the Investment Fund would provide to the new Agent the expiration date of the tax documentation, which the new Agent would monitor for purposes of renewing tax documentation by such date.

Issue 11: Foreign Agent Should be Able to Appoint Another Agent (Prop. Reg. § 1.1474-1(a)(3)(ii))

Recommendation # 11: We request that the last sentence in Prop. Reg. § 1.1474-1(a)(3)(ii) be eliminated: "However, a foreign agent cannot apply the provisions of this paragraph (a)(3) to appoint another person its agent with respect to payments it receives from the withholding agent."

Support for Recommendation: For current Chapter 3 and 61 purposes, an agent (the "Agent"), with the consent of the principal, may appoint another agent (the "Sub-Agent") to perform some or all of the U.S. tax withholding and reporting activities to which the Agent is contractually committed to the principal. Each agent may be either an affiliate of its principal or unrelated to the principal. Prohibiting such an agency arrangement would punitively increase the cost of FATCA compliance and restrict the manner in which business may be conducted.

For example, a custodian (the withholding agent under Prop. Reg. § 1.1474-1(a)(3)) should be able to appoint an affiliate as its agent (the Agent) to perform the custodian's entire range of U.S. tax withholding and reporting activities, and the Agent in turn should be able to appoint an unrelated vendor (the Sub-Agent) to merely prepare and issue information returns. In this example, the Agent and not the custodian has the expertise and systems necessary to ensure that the FATCA requirements are met in the most efficient manner, and the Sub-Agent has the optimal solution to meet the downstream information reporting requirement. Absent the ability to appoint the Sub-Agent, the Agent and the custodian would be forced to either incur the added expense of developing an optimal in-house reporting solution or operate with less than optimal reporting means.

<u>Issue 12: Intergovernmental Approach to FATCA</u>

The AGC welcomes the publication of the joint statement on February 8 by the United States and certain European governments announcing the intent to work together to develop and enter into bilateral agreements respecting international tax compliance and the implementation of FATCA (the "Joint Statement"). This effort may represent the best hope for the acceptance of FATCA by foreign governments and the resolution of conflicts between FATCA requirements and foreign laws.

The AGC advocates that the bilateral agreement to be entered into with each FATCA partner country have uniform provisions, unlike the present case with U.S. income tax treaties where the provisions are separately negotiated with each country and vary significantly. Our members are global financial institutions that operate in numerous jurisdictions around the world, including in FATCA partner countries as well as in jurisdictions that have not yet

announced their participation in the intergovernmental approach. If the FATCA partner agreements provide for consistent due diligence and reporting requirements, global financial institutions may be able to build systems on a single platform that can be used in multiple jurisdictions, thereby streamlining FATCA implementation and minimizing the risk of systemic errors and inconsistencies. We believe that a model bilateral agreement applied uniformly to all interested countries is needed to ensure the success of this important cooperative effort and the enrollment of FATCA partners without undue delay.

In describing the possible framework for the intergovernmental approach to tax compliance, the Joint Statement says that the proposal would apply to "FFIs established in the FATCA partner [country]". We are concerned that the term "established" may mean that the benefits of a FATCA partnership would apply only to financial institutions that are organized or incorporated in the FATCA partner country. We seek clarification that a bilateral agreement with a particular FATCA partner will also cover branches of any financial institution located in that partner country, even if it is a branch of a financial institution that was organized in a different country. This would mean that foreign branches of U.S. financial institutions that act as qualified intermediaries and are treated as PFFIs for FATCA purposes would also be covered by a FATCA partner agreement when they are located in a FATCA partner country. We believe this clarification is necessary in order for FATCA to apply uniformly to all financial institutions located in and operating in the same FATCA partner country.

The Joint Statement contemplates that the U.S. government will commit to reciprocal reporting on "U.S. accounts of residents of the FATCA partner [country]". In context, the term "U.S. accounts" would seem to have a different meaning here than in the FATCA proposed regulations. The term appears to refer to accounts maintained in the United States for the benefit of residents of a FATCA partner country, rather than accounts maintained outside the United States directly or indirectly for the benefit of a U.S. person. We believe that reciprocal reporting should be limited to accounts maintained in the United States. Such reporting should not apply to accounts maintained by U.S. financial institutions (or their foreign subsidiaries) outside the United States for the benefit of residents of the FATCA partner country. We are concerned that if reciprocal reporting were required of branches or subsidiaries of U.S. financial institutions located outside the United States, U.S. financial institutions would be unfairly

burdened and at a competitive disadvantage as compared to local financial institutions. Accordingly, we would appreciate your confirmation that reciprocal reporting will apply only to accounts maintained in the United States.

For reciprocal reporting to be implemented without undue additional burdens and at a reasonable cost to U.S. financial institutions, we believe it is critical that the documentation and reporting standards established under U.S. tax law are also used for this purpose. In particular, the determination of whether an account holder is or is not a tax resident of a FATCA partner country should be based on U.S. tax principles for determining the country of tax residence. This would mean that the permanent residence country of an account holder, as shown on line 4 (Permanent Residence Address) of a Form W-8, would determine whether the account is reportable to a particular FATCA partner country. If no tax form is provided for an account, then the mailing address for the account should be treated as the country of tax residence. It is not feasible for a U.S. financial institution to apply different standards for determining the tax residence country of an account for each FATCA partner country. Furthermore, information reporting to the IRS on accounts for residents of a FATCA partner country should be done on a Form 1042-S. Reportable amounts should be limited to amounts required to be reported on Form 1042-S under U.S. tax law. If it is determined that it is necessary for U.S. financial institutions to report foreign source income received by a tax resident of a FATCA partner country, then, such reporting should not be required before 2017 or a later year when foreign passthru payments become subject to FATCA reporting and withholding. By adopting these standards for reciprocal reporting by U.S. financial institutions to FATCA partners, the United States would be offering uniform standards of reporting at a minimum of additional cost, and the information shared would be useful to FATCA partners in enforcing their own tax laws.

The AGC urges all the governments involved in developing the intergovernmental approach to FATCA and the bilateral agreements to engage and consult with, either directly or indirectly through industry associations, the financial institutions that operate in each FATCA partner country. Their advance views on the practicalities involved in implementing the proposed features of the intergovernmental approach to international tax compliance are needed to ensure a workable approach. As progress is made in the intergovernmental

negotiations, there also needs to be transparency as to the proposals being considered so that this type of feedback can be given before the bilateral agreement is finalized.

Recommendation # 12: We respectfully request that the Treasury Department and IRS consider using the above described principles in negotiating bilateral agreements on international tax compliance with potential FATCA partner countries.